

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**PIZZA PIAZZA, INC. D/B/A BADO'S  
PIZZERIA & DELICATESSEN AND D/B/A  
BADO'S PIZZA GRILL AND ALE HOUSE**

**and**

**Case 06-CA-279445**

**ANDREW YOHO, an Individual**

*Julie R. Stern and Jessica Michael, Esqs.,*  
for the General Counsel.  
*John Linkosky, Esq.,*  
for the Respondent.

**DECISION**

**Statement of the Case**

**IRA SANDRON, Administrative Law Judge.** The case arises from a complaint issued on November 23, 2021<sup>1</sup> (the complaint), based on charges that Andrew Yoho (Yoho) initially filed on July 6, against the Respondent.

The complaint alleges that on July 1, Owner Frank Badolato (Badolato) discharged Yoho due to his protected concerted activities, and committed independent violations of Section 8(a)(1) of the Act by threatening him with discharge and telling him that employees did not have the right to complain about wages, hours, and working conditions.

Pursuant to notice, I opened the hearing by Zoom on February 9, 2022, and at the Respondent's request for an in-person hearing, adjourned it until April 28, in the hope that an in-person hearing would then be feasible. The General Counsel filed a request for a special appeal under Sec. 102.26 of the Board's Rules. On March 14, the Board accepted the request but denied the appeal on the merits. The Board noted that the Agency had announced its intention to resume in-person operations on April 4 and concluded that I had not abused my discretion.

Accordingly, the trial resumed and concluded on April 28 in Pittsburgh, Pennsylvania, in compliance with all COVID protocols mandated by the General Counsel for on-site hearings. I

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<sup>1</sup> All dates hereinafter occurred in 2021 unless otherwise indicated or clear from context.

afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

### Witnesses and Credibility

Counsel for the General Counsel (the General Counsel) called Yoho and current employee Aiden Smith (Smith).

The Respondent called Badolato; Office Manager Marianna Logsdon (Logsdon); and Supervisor Leah Badolato (Ms. Badolato), Badolato's daughter.

When credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69, slip op. at 1 fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

In assessing Smith's credibility, I take into account that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest." *PPG Aerospace Industries*, 355 NLRB 103, 104 (2010), quoting *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). In this regard, Smith appeared visibly uncomfortable as he testified in Badolato's presence. Still, he answered questions readily with no apparent efforts to embellish his accounts of what occurred or to either help or hurt Yoho's case against the Respondent. Thus, he corroborated Yoho in many, but not all, respects. Accordingly, I find that Smith was a credible witness.<sup>2</sup>

I cannot say the same for Badolato. His version of his interaction with Yoho on the critical morning of July 1 was wholly unbelievable. Thus, he testified that when stood up from lighting the ovens, Yoho, whose head was shaved, was two inches from his face and immediately started screaming demands and that his first thought was of Robert DeNiro in Taxi Driver. According to Badolato, Yoho mentioned his rights under the NLRA and repeatedly shouted (inconsistent) statements about being fired—"You can't fire me;" "You are going to fire me, aren't you;?" and, a dozen times, "You going to fire me? Come on say it." (Tr. 185-186.)

Moreover, Badolato incredibly testified that he remained so afraid of Yoho that he called the police on him—even after Yoho had already left the premises and sat in his car in a municipal parking lot for 15-20 minutes. I conclude that Badolato's calling the police was retaliatory, an attempt to intimidate Yoho, and/or a disingenuous effort to lend corroboration to what he would later allege to have been Yoho's intimidation. Nor do I credit Ms. Badolato's description of her father's emotional state when she saw him several hours after the incident ("[A] very distressed man, worried man. . . . [I]n his eyes, he was scared."). (Tr. 208-209.) She, too, engaged in transparent hyperbole.

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<sup>2</sup> A view that both the General Counsel (GC Br. 8) and the Respondent (R. Br. 42) share.

In testifying about Yoho's alleged menacing conduct, Badolato maintained the same poise, demeanor, and tone that he exhibited throughout his testimony, showing no change in emotion whatsoever. In marked contrast, when Yoho testified about the incident and related how Badolato swore at him and said he was fired, he became tearful, choked up, and had to pause repeatedly before he could continue. Based on this, Badolato's larger physical stature (he is a head taller than Yoho), and Badolato's position as the hands-on owner, I do not believe Badolato's version, which I find concocted. Instead, I credit Yoho's account of what occurred that morning. Furthermore, Badolato's farfetched testimony on the incident substantially diminishes his overall credibility.

Also undermining Badolato's credibility were his answers regarding employee complaints about being short-staffed. On direct-examination, when asked if Yoho ever complained about short-staffing prior to July 1, he answered, "No, not really." (Tr. 177.) And, on cross-examination, he avoided giving a straight answer despite being repeatedly asked if he ever heard that employees were making complaints about being short-staffed. Based on his own testimony and that of Logsdon, it is clear that he closely oversees daily operations and is regularly kept apprised of what is going on in the restaurant. As I will explain, I am satisfied that Manager George Pikras (Pikras) informed him prior to June 29 of complaints by kitchen employees.

Finally, I am also somewhat perplexed by Badolato's testimony that kitchen employees were not required to wear plastic gloves and that he has never worn them in the 37 years that he has been in the restaurant business. One must ask why then, even according to his own testimony, he had gloves on regular order and told Yoho on June 29 that he would have them for the kitchen employees as soon as he could get them. Both Yoho and Smith on June 29 heard him bring up the cost of plastic gloves, so I have to assume that he did not buy them unless he felt obliged to do so, whether or not legally required.

Yoho appeared candid, testified in considerable detail, and was fully or substantially corroborated by Smith on many critical points. As I would understandably expect, they were not totally in sync, leading me to believe that they were testifying from genuine recall rather than trying to collude. Badolato was not credible, and Yoho's testimony about his conversations with Pikras and Mariana Cain (Cain), head bartender, went un rebutted. Accordingly, I credit his testimony on key matters.

### **Facts**

Based on the entire record, including testimony and my observations of witness demeanor, documents, stipulations, and the General Counsel's and the Respondent's thoughtful posttrial briefs, I find the following.

Board jurisdiction as alleged in the complaint is admitted (see Jt. Exh. 1), and I so find. The Respondent, a Pennsylvania corporation, with a place of business in Mount Lebanon, Pennsylvania, operates a public restaurant selling food and beverages.

Badolato is the sole owner. By his own account, he is the only one who can hire, fire, issue discipline, give time off, and cut employees' hours. In this regard, Logsdon, who handles payroll and bookkeeping, testified that Badolato sets work schedules and that when an employee requests a change in schedule, she notifies him for approval. Badolato normally comes in every morning at 5 a.m. and, after the staff comes in at 11 a.m., does paperwork for an hour or 2.

The restaurant specializes in serving pizza and Italian cuisine. There is a dining area ("front of the house") and a kitchen ("back of the house"), separated by two walls. Employees who work in the front of the house include bartenders and servers who serve customers in the dining room, whereas those who work in the kitchen are cooks primarily responsible for food preparation. The bar continues to serve after the kitchen stops taking customer orders. The kitchen has three stations: pizza-making, salads and sandwiches, and the grill.

#### *Yoho's employment*

Yoho, whose nickname is "Roo," began work as a cook on February 1. Because he had experience as a pizza maker, his primary duty was working at the pizza-making station, but he also made salads and sandwiches and took delivery orders by phone. According to Badolato, he was a very good employee.

On average, three employees worked in the kitchen. Working regularly with Yoho were Smith, Pikras, Randy Bishop (Bishop), and Scott Whitacre (Whitacre). Smith also usually was a pizza maker, and Bishop and Whitacre usually worked the grill, but they all also rotated as needed.

Payroll records give Pikras' job title as "manager." (GC Exh. 2 at 6.) Both Yoho and Smith testified that at the times of their hire (Smith in 2019), they were told that Pikras was the kitchen manager and they were to follow his directions. They considered him their supervisor, and he in fact directed their work and gave them instructions on what to do. On about June 10, Yoho had to leave early. He told Pikras, who in turn notified Badolato, who then arranged for someone to fill in for Yoho's shift. (Badolato at Tr. 189.) When Yoho or Smith wanted a schedule change, they notified Pikras.

In Pikras' absence, both Yoho and Smith considered Cain, a bartender in charge of the front side of the restaurant, to be their direct supervisor, and Badolato testified that if employees had any issues, Cain was one of the individuals whom they could ask to tell Badolato that they wanted to talk to him. Cain had the authority to decide what time the kitchen would stop preparing customers' pizza orders.

#### *Employee's complaints prior to June 29*

Yoho, Smith, Bishop, and Whitacre often talked about how understaffed they were and having to perform work outside their job duties, dishwashing in particular (there was supposed to be a dishwasher, but no one was in that position); and unsanitary working conditions.

At different times, Yoho and one or more other employees told Pikras that they needed to have a dishwasher as the volume of work was increasing post-COVID. Pikras responded that he

would handle it. As Smith put it, the kitchen staff had sporadic conversations over a period of weeks, usually on weekends when they were busy, about the need for a dishwasher and another cook on the grill.

5 They also raised sanitation issues with Pikras. Yoho frequently spoke with him about food safety, such as the temperature of the meat, handling of meat, and leaving food out too long. He also talked to Pikras about the ceiling leaking rainwater onto the grill, which at times drenched Bishop and Whitacre. According to Yoho, the biggest issue toward the end of his employment was lack of plastic gloves, which he considered necessary when dealing with raw meat. Smith corroborated him  
10 that employees discussed the need for gloves. According to Smith, the kitchen employees had discussed walking out prior to June 29 but never did so, consistent with Yoho's testimony that they had talked about it twice the previous week, and several times before then.

*June 29*

15 On June 29, Yoho, Smith, and Whitacre were scheduled to work starting at 11 a.m. See GC Exh. 3. Pikras did not work that day.

20 The previous day, the kitchen staff had run out of plastic gloves. That morning, Yoho, acting without express authorization from other employees, approached Badolato and said that the kitchen staff needed gloves. Badolato asked why, and Yoho replied, to handle raw meat. Badolato responded that he did not have to provide them gloves and that he should use his bare hands. When Yoho said that he would not, Badolato became irate. They had a second conversation when Badolato was on his way out the back door of the kitchen that led  
25 to the alley. Raw chicken was still on the floor. Badolato told him to put the chicken away, but Yoho replied that he would not do so without gloves. As he left, Badolato yelled something to the effect that he did not need to provide gloves, and he told Yoho to use a plastic bag or bring his own gloves. In one of their conversations, he stated that the kitchen employees went through too many gloves, and it cost too much money to keep buying them.<sup>3</sup>

30 After Badolato left, Yoho, Smith, and Whitacre discussed how careful they had to be about washing their hands after each time they touched raw meat. This was rough on their hands, and Whitacre suggested that Yoho go to a nearby pizza restaurant to see if they had any spare gloves. Yoho did so at about 1 or 2 p.m. and was able to get a handful.

35 That evening, neither Badolato nor Ms. Badolato were at the restaurant, and Cain was solely in charge. Business was typically slow until 4 or 5 p.m., when the dinner rush started. I credit Yoho and Smith that it was a very busy night and that they and Whitacre found it increasingly hard to keep up with the number of customer orders. Logsdon testified that the  
40 volume of work "seemed very normal" (Tr. 201), but she was in her office performing bookkeeping/ payroll functions and therefore not in a good position to judge what was happening in the kitchen, and the Respondent produced no records to rebut Yoho's and Smith's testimony. It was very hot that day (according to both Smith and Logsdon), making

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<sup>3</sup> Smith, who was next to them, corroborated Yoho's account that Badolato mentioned the cost of gloves.

working in the kitchen even harder. Yoho, Smith, and Whitacre discussed the difficulty they were having and the shortage in staff, and the possibility of walking out for these reasons. According to Smith, it was Yoho's idea to walk out over understaffing and the extreme heat.

At about 7 p.m., Yoho went to see Cain on the front side when it seemed that pizza orders were not slowing down. He said that she needed to close the kitchen early, or they would be unable to fill all orders. She said that there was no way she would do this. He responded that if she did not, the kitchen employees were going to walk out.

Yoho reported her response to Smith and Whitacre and asked if they wanted to walk out together because they could not keep up with the orders. They replied yes. He returned to see Cain and told her that they would walk out if she did not close by 8 p.m. She said no. The kitchen kept receiving order slips, and Yoho went to see Cain a third time, at about 7:45 p.m. He again asked if she would close the kitchen. She replied no and walked away.

Yoho went back to Smith and Whitacre and asked, "Guys, are we going to do this [walk out]?", and both of them said yes. (Tr. 73.) Yoho punched out at 7:56 p.m. and Smith at 7:58 p.m. (GC Exh. 2 at 6), and they left the premises. Whitacre, however, went out for a cigarette break but afterward returned to work and did not punch out until 9:47 p.m. (Id. at 8.) Smith was scheduled to work until about 8:30 p.m., so Whitacre ended up working much later than that.

Badolato testified that Cain notified him through Ms. Badolato of the walkout. I believe that she also notified him of her earlier conversations with Yoho that evening. Clearly, Badolato was kept abreast of what was happening in the restaurant, and the threat of an employee walkout would certainly have been of very serious concern. Indeed, he testified that upon learning of the walkout, he personally went to the restaurant and assisted with filling pizza orders.

The next day, Smith apologized to Cain for the way that he had left. She replied that his apology was accepted, and he went on to work that day. He apologized later in the week to Badolato, who also said that his apology was accepted. He suffered no detrimental consequences for having walked out.

### *July 1*

Yoho was scheduled to start work at 11 a.m. but went in at 10 a.m. to talk to Badolato about working conditions. Badolato was in the kitchen when he arrived. No other employees specifically appointed Yoho to be their spokesperson on July 1, but he testified that he did this on their behalf. Yoho pulled out from his pocket handwritten notes and said that he had requests, not demands, and wanted to keep their conversation congenial. He mentioned Section 7 rights protecting concerted protests and that the biggest issue was not having enough people in the kitchen and the need for a full-time dishwasher and another chef, preferably two. Badolato responded, "You don't get to tell me how run my business." (Tr. 82.) Yoho raised the issue of sanitation, to which Badolato asked to what he was referring. Yoho answered, the rain that came through the ceiling. Badolato replied that it had been

fixed, and Yoho pointed out that it had taken 3 weeks.

Badolato then said, “You don’t even work here anymore. Why are we talking about this?” (Tr. 84.) Yoho replied that he still worked there and was concerned with what happened in the restaurant. Badolato responded, “You quit. You walked out.” (Tr. 85.) Yoho stated that he had walked out, not quit. They went back and forth, with Badolato repeating that Yoho had quit, and Yoho denying it.

Badolato told him to get out of the kitchen, and Yoho replied that he would leave only if he was fired because he had protection and did not think Badolato should fire him.

Badolato looked (apparently glared) at him and said, “Are you fucking threatening me?” (Ibid.) Yoho said no. Badolato took several steps toward Yoho until he was only one or two inches away, and Yoho stepped back. Badolato said, “Are you fucking threatening me? Are you coming in here and fucking threatening me? . . . Get out. Get the fuck out of my kitchen.” (Tr. 86.)

Yoho offered to come back the next day if Badolato needed to calm down. Badolato said no, because Yoho had quit, and for him to get out.

Badolato’s testimony comported with Yoho’s to the extent that he stated he was not firing Yoho but Yoho had walked out, and that he told Yoho to get out of the kitchen and leave the restaurant.

I accept Badolato’s testimony that he had difficulty hiring new employees, including dishwashers, and advertised for positions by a variety of means.

### **Analysis and Conclusions**

#### *Agency status of Pikras and Cain*

The Respondent denied paragraph 6 of the complaint, which alleges that Pikras and Cain are its agents,<sup>4</sup> averring that they instead are regular employees. However, the Respondent did not call them to testify.

The General Counsel asserts (GC Br. 11) that an adverse inference can be drawn from the Respondent’s failure to call Pikras and Cain without explanation, citing the “missing witness” rule that allows a judge to draw an adverse inference against a party that fails to call a witness who is under the control of that party and is reasonably expected to be favorably disposed towards it. See, e.g., *Natural Life, Inc. d/b/a Heart & Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 1 (2018), citing *Electrical Workers IBEW Local 3 (Teknion, Inc.)*, 329 NLRB 337, 337 fn. 1 (1999); *Reno Hilton*, 326 NLRB 1421, 1421 fn. 1 (1998), enf’d. 196 F.3d 1275 (D.C. Cir. 1999). Conceptually, it may be problematic to invoke the rule against an employer that is contending the individuals in question are not its agents.

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<sup>4</sup> The General Counsel does not allege them to be 2(11) supervisors.

Nonetheless, their failure to testify results in Yoho's and Smith's testimony about their authority and conversations they had with them going un rebutted. I also do find that an adverse inference can be drawn against the Respondent for not asking any of its witnesses—all admitted supervisors and agents—questions on the subject of Pikras' and Cain's authority, thereby not providing rebuttal to Yoho's and Smith's testimony. See *Daikichi Corp.*, 335 NLRB 622, 622 (2001); *Colorflow Decorator Products*, 228 NLRB 408, 410 (1977), enfd. mem. 583 F.2d 1288 (5th Cir. 1978).

I therefore credit Yoho's and Smith's credible, consistent, and unrefuted testimony on the roles that Pikras and Cain played, as well as conversations that they had with them.

An individual may be deemed an agent based on either actual or apparent authority to act for the employer. *Rogan Brothers Sanitation, Inc.*, 362 NLRB 547, 552 (2015); *Pratt (Corrugated Logistics), LLC*, 360 NLRB 304, 304 (2014).

Regarding apparent authority, the Board has a long-established policy and practice of applying common law principles of agency to find apparent authority when ““under all the circumstances, the employee would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.”” *SAIA Motor Freight, Inc.*, 334 NLRB 979, 979 (2001), citing *Waterbed World*, 286 NLRB 425, 426–427 (1987) (full citation omitted). See also *Rogan Brothers*, above; *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998). The burden of proof is on the party averring agency status. *Suburban Electrical Engineers/Contractors, Inc.*, 351 NLRB 1, 3 (2007); *CNP Mechanical, Inc.*, 347 NLRB 160, 169 (2006).

As to Pikras, Smith in 2019 and Yoho in 2021, at the times of their hire, were told that Pikras was the kitchen manager and they were to follow his directions. They considered him their supervisor, and he in fact directed their work. When Yoho left early on a previous occasion, Pikras notified Badolato, who arranged for someone to fill in for Yoho's shift. When Yoho wanted a schedule change, he notified Pikras. Pikras told Yoho that management would remedy Yoho's complaints about working conditions, and he told both Yoho and Smith that management was planning to have a meeting with kitchen employees in response to the concerns that they expressed. Payroll records show Pikras' job title as “manager.”

Turning to Cain, Badolato testified that if employees had any issues, they could tell Cain that they needed to talk to him. When Pikras was not present, Yoho and Smith considered Cain, who was in charge of the front side of the restaurant, to be their supervisor. She had the actual authority to decide what time the kitchen would stop preparing customers' pizza orders and exercised that authority on June 29 in denying Yoho's requests to close the kitchen early.

Based on the above, I conclude that Pikras and Cain were apparent, if not actual, agents of the Respondent for purposes of the issues herein.

### ***Independent 8(a)(1) allegations***

The alleged 8(a)(1) threat of discharge for engaging in protected activity, and the coercive

statement that employees did not have a right to complain about terms and conditions of employment, relate to the July 1 meeting when Badolato allegedly unlawfully discharged Yoho. No other employees were present. Accordingly, the statements are not severable from the discharge and, if the discharge is found unlawful, it is unnecessary to find them the bases for additional violations. See *Laborers Int’l Union, Local 578 (Shaw Stone & Webster Contr., Inc.)*, 352 NLRB No. 118, slip op. at 19 (2008).

### *Yoho’s discharge*

In cases in which the issue is the motive behind an employer’s action against an employee (was it legitimate or based on animus on account of the employee’s protected concerted activities?), the appropriate analysis is provided by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); see also *Auto Nations, Inc.*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir. 2015).

Under *Wright Line*, the General Counsel bears the initial burden of establishing that an employee’s union or other protected concerted activity was a motivating factor in the employer’s adverse employment action. *Wright Line*, above at 1089. The Board has held that the General Counsel can meet this burden by establishing (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the employer’s part. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). In *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 5–8 (2019), the Board clarified the animus element of this test, explaining that the General Counsel “does not *invariably* sustain his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains *any* evidence of the employer’s animus or hostility toward union or other protected activity.” *Id.*, slip op. at 7 (emphasis in original). “Instead, the evidence must be sufficient to establish that a causal relationship exists between the employee’s protected activity and the employer’s adverse action against the employee.” *Id.*, slip op. at 8.

Once the General Counsel makes out a *prima facie* case, the burden shifts to the respondent to show that the same action would have taken place even in the absence of the protected activity. *Wright Line*, above at 1089; *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 1 (2018); *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007). Where the General Counsel has made a strong showing of discriminatory motivation, the employer’s defense burden is substantial. *East End Bus Lines*, *Ibid*; *Bally’s Park Place, Inc.*, 355 NLRB 1319, 1321 (2010), enfd. 646 F.3d 929 (D.C. Cir. 2011).

If a respondent’s proffered justification for its action is found pretextual, it must be determined whether surrounding facts tend to reinforce that inference of unlawful motivation. *Electrolux Home Products, Inc.*, 368 NLRB No. 34, slip op. at 3, 4 (2019), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

*Protected concerted activity*

The first question is whether Yoho engaged in protected concerted activity before June 29, on June 29, and on July 1. The Respondent's argues that he did not. I disagree.

In *Myers Industries (Myers 2)*, 281 NLRB 882 (1986) (full history omitted), affirming the standard in *Myers Industries (Myers 1)*, 286 NLRB 493 (1984), the Board held that protected concerted activity encompasses "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Id.* at 887. The Board distinguished this from situations where the employee has acted solely on his or her own and solely on his or her own behalf.

The activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. *Whittaker Corp.*, 289 NLRB 933, 933 (1988); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1986). Moreover, concerted activity can be found when a lone employee raises issues of common concern to an employer, even if the employee did not confer in advance with coworkers. *MCPC, Inc. v. NLRB*, 813 F.3d 475, 484 (3rd Cir. 2016). A concerted objective may be inferred from the circumstances. *Whittaker Corp.*, above; *Enterprise Products*, 264 NLRB 946, 946 (1982); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3rd Cir. 1976).

Prior to June 29, Yoho discussed with coworkers Bishop, Smith, and Whitacre how understaffed they were and having to do dishwashing, as well as unsanitary working conditions. At different times, Yoho with one or more other employees, told Pikras that they needed to have a dishwasher and another cook on the grill. This constituted protected concerted activity.

I have found Pikras to have been an agent of the Respondent, and the Respondent therefore had knowledge of Yoho's concerted activity on that basis. Additionally, Badolato was clearly a hands-on owner, according to his own testimony and other evidence, and I am convinced that Pikras notified him of Yoho's and other employees' complaints about being short-staffed. I note Badolato's evasiveness in answering whether he knew of such employee complaints, and his answer of "[n]o, not really," when asked if Yoho ever complained to him about short-staffing.

I credit Yoho and Smith that not having plastic gloves was problem even before June 29 (as opposed to Badolato's suggestion that it arose only that day). That morning, Yoho complained to Badolato about the lack of gloves to handle raw meat. That this was a concerted issue is demonstrated by discussions that Yoho had with Smith and Whitacre that day, in which they decided that they had to wash their hands after each time they touched raw meat, as well as Whitacre's asking Yoho to go to a nearby restaurant to see if they had spare gloves. Accordingly, I conclude that Yoho's complaining to Badolato about lack of gloves was concerted activity even if he was not expressly authorized to act on Smith's and Whitacre's behalf. See the Board and Third Circuit Court of Appeals cases cited above.

On the evening of June 29, Yoho, Smith, and Whitacre were unable to keep up with incoming customer pizza orders, and they talked about this in the context of their being short-

staffed and the heat that day. At Yoho's initiation, they discussed the possibility of walking out over these issues. This occurred prior to Yoho's first conversation with Cain, when he asked her to close the kitchen early because they were falling behind in filling orders. Yoho had two additional conversations with her. When she still refused to close the kitchen early, he and Smith walked out by clocking out and leaving shortly before 8 p.m.

I conclude that Yoho's conversations with Cain concerned employees' conditions of employment and constituted concerted protected activity.

Cain was the sole person in charge of the restaurant's operations that evening and was an agent for purposes of Yoho's communications with her. Badolato testified that Cain notified him through Ms. Badolato of the walk-out. I am certain that Cain also advised him, directly or indirectly, of her earlier conversations with Yoho in which he threatened a walk-out—which certainly had to be considered a very serious matter. Indeed, after he was advised of the walk-out, Badolato almost immediately went to the restaurant and worked on pizza orders. In any event, because Cain was an agent, Yoho's complaints to her about conditions in the kitchen were imputable to the Respondent.

On July 1, Yoho first raised to Badolato concerns that the kitchen staff had discussed about being short-staffing (the need for additional chefs and a dishwasher), a subject that they had raised to Pikras prior to June 29 and that Yoho had implicitly raised to Cain on June 29. Yoho brought up employees having the right to engage in concerted activity. This constituted protected concerted activity on Yoho's part, even if he was not specifically authorized to speak on behalf of his coworkers. Again, see the NLRB and Third Circuit Court of Appeals cases above.

Accordingly, I find that the General Counsel has established that Yoho engaged in protected concerted activities on and before June 29 and on July 1 that were known to the Respondent.

Animus against Yoho is shown by Badolato's statement on July 1, "You don't get to tell me how run my business," after Yoho raised the issue of short-staffing; by his telling Yoho that by walking out on June 29, Yoho had quit; and by telling him to "[f]ucking get out."

Accordingly, I find that the General Counsel has established the elements necessary for a prima facie case and now turn to whether the Respondent has rebutted it.

The Respondent does not dispute that Yoho was considered a very good employee but contends that (1) he did not engage in protected concerted activity; and (2) even if he did, his conduct on July 1 warranted his discharge.

I reject both defenses. As to the first, I have found that Yoho engaged in protected concerted activities, all of which was known to the Respondent. As to the second, the Respondent (R. Br. 35–36) accurately cites *General Motors LLC*, 369 NLRB No. 127 (2020), for the proposition that the *Wright Line* framework applies to cases involving abusive conduct

in connection with activity protected by Section 7 of the Act. However, I have wholly discredited Badolato's account of what occurred that morning and concluded that Badolato was the one who was abusive and threatening, not Yoho.

5 Tellingly, Badolato conceded that he told Yoho, "I'm not firing you. . . . You walked out. . . .", suggesting that Badolato considered Yoho's employment terminated on June 29, contrary to Badolato's testimony that Yoho would still be working at the restaurant if not for his conduct on July 1.

10 The Respondent points out (R. Br. 30) that Smith is still working at the restaurant. However, the fact that the Respondent took no action against Smith for walking out on June 29 does not insulate the Respondent from being found to have unlawfully discriminated against Yoho. An employer's failure to take action against all or some other union supporters does not disprove discriminatory motive, otherwise established, for its adverse action against  
15 all or some other union supporters. See, e.g., *Handicabs, Inc.* 318 NLRB 890, 897-898 (1995), enfd. 95 F.3d 681 (8th Cir. 1996); *Master Security Services*, 270 NLRB 543, 552 (1984). The same principle can be applied to protected concerted activity, here, the walk-out. Furthermore, Yoho was the one who threatened the walk-out to Cain, and he continued to voice complaints on July 1, whereas Smith expressed contrition.

20 Accordingly, I conclude that the Respondent has not rebutted the General Counsel's case, and violated Section 8(a)(1) by discharging Yoho on July 1, 2021, because he engaged in protected concerted activities.

## 25 CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

30 2. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act: Discharged Andrew Yoho because he engaged in protected concerted activities.

## REMEDY

35 Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

40 Because the Respondent discriminatorily discharged Andrew Yoho, it must make him whole for any losses of earnings and other benefits suffered as a result of that discrimination. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, the Respondent shall compensate Yoho for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

5 *Advoserv of New Jersey, Inc.*, 363 NLRB 1324 (2016); *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). The Respondent shall compensate Yoho for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable next backpay, with interest at the rate prescribed in *New Horizons*, above,  
10 compounded daily as prescribed in *Kentucky River Medical Center*, above. In addition to the backpay-allocation report, the Employer shall file with the Regional Director copies of Yoho's corresponding W-2 forms reflecting the backpay awards. *Cascades Containerboard Packing—Niagara*, 370 NLRB No. 76 (2021).

15 The General Counsel also seeks an order that Yoho be paid for consequential damages and other benefits he lost because of his discharge, without elaborating on what they would encompass. The Board to date has not determined that such a remedy should be considered beyond those I have ordered above. Without making a judgment on whether that additional remedy is worthy of consideration, it is not within my purview to sua sponte expand remedies under the Act.  
20 Accordingly, I will not do so.

#### ORDER

25 The Respondent, Pizza Piazza, Inc. d/b/a Bado's Pizzeria & Delicatessen and d/b/a Bado's Pizza Grill and Ale House, Mount Lebanon, Pennsylvania, its officers, agents, successors, and assigns,

1. Shall cease and desist from

30 (a) Discharging or otherwise discriminating against employees who engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

35 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Andrew Yoho full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position,  
40 without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Yoho whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

45 (c) Remove from our files all references to Yoho's discharge, and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Mount Lebanon, Pennsylvania, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If during the pendency of these proceedings, the Respondent has gone out of business or closed its facility, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2021.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

Dated, Washington, D.C. June 16, 2022.




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Ira Sandron  
Administrative Law Judge

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<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board (NLRB) has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you because you protest working conditions of concern to you and other employees, or otherwise engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Andrew Yoho reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without any without prejudice to his seniority or any rights or privileges previously enjoyed.

WE WILL make Yoho whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to our unlawful discharge of Yoho, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

PIZZA PIAZZA, INC. D/B/A BADO'S  
PIZZERIA & DELICATESSEN AND D/B/A  
BADO'S PIZZA GRILL AND ALE HOUSE  
\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine

whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov)

William S. Moorhead Federal Building, Room 904, Pittsburgh, PA 15222-4111  
(412) 395-4400, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/06-CA-279445](http://www.nlr.gov/case/06-CA-279445) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (412) 690-7117.